United States Court of Appeals

for the Second Circuit

APPENDIX

5. In addition to the money

75-7098

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

DEVLIN ADAMS, by ROSSINI ADAMS,
his parent and natural guardian,

Plaintiff,

-against-

CASPAR WEINBERGER, Secretary of
Health, Education and Welfare,

Defendant.

- x

APPENDIX

Prof. Oscar G. Chase
Attorney for Plaintiff-
Appellant
c/o Brooklyn Law School
250 Joralemon Street
Brooklyn, New York
Tel. No. 625-2200

Of Counsel:
John C. Gray, Jr.
Brooklyn Legal Services
Corporation B

PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

DEVLIN ADAMS by Rossini Adams, His Parent and Natural Guardian, Plaintiff	
against	73 Civ. 633
CASPAR WEINBERGER, Secretary of H.E.W. Defendant	

INDEX ON APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF N.Y.

F3C 633

DEVLIN ADAMS, Plaintiff

by Rossini Adams, his parent
and natural guardian

vs.

CASPER WEINBERGER, Secretary
of Health, Education & Welfare,
Defendant

COMPLAINT

1. Plaintiff, an infant, brings this proceeding by his mother and natural guardian Rossini Adams.

2. Plaintiff resides with his mother at 749 Vermont Street, Brooklyn, N. Y. Plaintiff was born on March 8, 1970.

3. Defendant, Casper Weinberger, is Secretary of the U. S. Department of Health, Education, and Welfare.

4. Plaintiff became eligible for child's insurance benefits under §202 of the Social Security Act (42 U.S.C.A. §402 (d)) because of the death of his father, Peter Mc Ginn, Jr., (054-22-7783) on February 18, 1970. Application for such benefits was filed on plaintiff's behalf by Rossini Adams on August 5, 1970.

5. Plaintiff's application was denied on November 10, 1970 on the grounds that paternity was not established. Reconsideration was requested and the denial was affirmed on January 20, 1972. A hearing was thereupon requested. By decision of Hon. Harry J. Sands dated November 20, 1972 the denial was again affirmed. A request

for review by the Appeals Council was denied per letter of Hon. Herman Elegant dated March 20, 1973.

6. Plaintiff has exhausted all administrative remedies. Review by this Court is therefore proper pursuant to 42 U.S.C.A. § 405.

7. Plaintiff was the natural child of Peter Mc Ginn, Jr., and the Administrative Law Judge, Hon. Harry J. Sands, so found (Para. 3, p. 5., Hearing Decision, November 20, 1972)

8. Plaintiff's father died on February 18, 1970, almost a month before plaintiff's birth.

9. Before his death, plaintiff's father provided financial assistance to plaintiff's mother which was intended as well for plaintiff's benefit in utero.

FIRST CAUSE OF ACTION

10. As a result of the facts alleged in paras. 1-9 herein, plaintiff is entitled to benefits pursuant to 42 U.S.C.A. 402 and 42 U.S.C.A. 416 (h) (3) A (ii).

11. The determination of the defendant is not supported by substantial evidence.

SECOND CAUSE OF ACTION

12. The Social Security Act allows certain "illegitimate" children to recover child's insurance benefits if paternity is established by "evidence satisfactory to the Secretary" and the insured was living with or contributing to the support of the beneficiary 42 U.S.C.A. §402 (d) (3); §416 (h) 3. However, children

born in wedlock are entitled to benefits without any showing that the father was living with them or contributing to their support, 42 U.S.C.A. 402 (d) (1), (3).

13. As described in para. 12 herein, the Social Security Act discriminates against certain "illegitimate" children, such as plaintiff, by requiring more proof of them than of "legitimate" children. This discrimination is invidious and arbitrary and is accordingly in violation of the Equal Protection Clause of the Fourteenth Amendment.

THIRD CAUSE OF ACTION

14. In addition to discriminating arbitrarily between "illegitimate" and "legitimate" children, the Social Security Act also discriminates arbitrarily between different classes of "illegitimate" children. Thus, if paternity is established by acknowledgment or by prior court decree, children will receive benefits without a showing that the father was living with or contributing to their support, 42 U.S.C.A. §416 (h) 3 (i). Children like plaintiff, however, who established paternity by other satisfactory evidence must also run the gauntlet of showing that their father lived with them or contributed to their support 42 U.S.C.A. §416 (h) (3) (ii). This discrimination also violates the Equal Protection clause.

WHEREFORE, plaintiff prays that:

a) Defendant be ordered to submit a certified copy of the transcript of the record upon which the decisions complained of are based; and

b) Upon such record, this Court review the decision of the defendant and revise and reverse same to award full benefits to plaintiff, including all back benefits and counsel fees; and

c) Enter a declaratory judgment that the Social Security Act is unconstitutional insofar as it discriminates against "illegitimate" children as alleged herein; and

d) Such other relief as may be just.

May ~~April~~ 3, 1973

Respectfully submitted,

OSCAR G. CHASE
Attorney for Plaintiff
c/o Brooklyn Law School
250 Joralemon St.
Brooklyn, N. Y. 11201

Tel: 625-2200

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

DEVLIN ADAMS, Plaintiff

by Rossini Adams, his parent and natural guardian

vs.

CASPER WEINBERGER, Secretary of Health, Education & Welfare, Defendant

---

FIRST AMENDED COMPLAINT

Index No. 73 C 633

PLEASE TAKE NOTICE that plaintiff hereby amends her complaint as of right pursuant to Rule 15 of the FRCP.

1. Paragraph 13 of the complaint herein is hereby amended by adding the following sentence thereto:

"Said discrimination also violates the Fifth Amendment of the Constitution."

2. Paragraph 14 of the complaint herein is amended by adding the following sentence thereto:

"Said discrimination also violates the Fifth Amendment of the Constitution."

Dated: Brooklyn, New York
August 3, 1973

Oscar G. Chase
Attorney for Plaintiff
c/o Brooklyn Law School
250 Joralemon Street
Brooklyn, New York 11201
Tel: 625-2200

the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.
Sworn to before me, this day of 19

JDP:GHW:dew
File No.
730497

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- x

DEVLIN ADAMS, by Rossini Adams,
his parent and natural guardian,

Plaintiff,

-against-

CASPAR WEINBERGER, Secretary of
Health, Education and Welfare,

Defendant.
- x

A N S W E R

Civil Action
No. 73 C 633

Defendant, Secretary of Health, Education and Welfare, files as part of his answer as required by Section 205(g) of the Social Security Act, as amended, 42 U.S.C. §405(g), a certified copy of the transcript of the record including the evidence upon which the findings and decisions complained of are based; and defendant, as to the averments upon which plaintiff relies:

FIRST: Admits paragraphs "1", "2", "3", "6", "8", and "12".

SECOND: Denies paragraphs "10", "11", "13", and "14".

THIRD: Admits so much of paragraph "4" that avers that an application for child's insurance benefits was filed on behalf of plaintiff by Rossini Adams on August 5, 1970; and

denies any other averments in the paragraph.

FOURTH: Admits the averments in paragraph "5" to the effect that plaintiff's application was denied at all administrative levels due to the failure of plaintiff to meet the requirements for child's insurance benefits

set out in Section 216(h)(2) and (3) of the Social Security Act, as amended, 42 U.S.C. §416(h)(2) and (3); and

denies any other averments in the paragraph.

FIFTH: Admits so much of paragraph "7" that avers that the Administrative Law Judge, Honorable Harry J. Sachs, found that

(a) Peter McGinn and Rossini Adams had a close personal relationship, and

(b) Devlin Adams was born on March 8, 1970; and

denies any other averments in the paragraph.

SIXTH: Admits so much of paragraph "9" that avers that Rossini Adams received some support from Peter McGinn until a month prior to Peter McGinn's death; and

denies any other averments in the paragraph.

FIRST DEFENSE

SEVENTH: The findings of fact of the defendant are supported by substantial evidence and are conclusive.

WHEREFORE, defendant respectfully requests judgment dismissing the complaint with costs and disbursements, and for judgment in accordance with Section 205(g) of the Social Security Act, as amended, 42 U.S.C. §405(g), affirming the decision of the Secretary.

Dated: Brooklyn, New York
September 10, 1973

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Defendant
225 Cadman Plaza East
Brooklyn, New York 11201

By: Geo H. Weller
GEORGE H. WELLER
Assistant United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

DEVLIN ADAMS, by Rossini Adams,
his parent and natural guardian,

Plaintiff,

-against-

CASPAR WEINBERGER, Secretary of
Health Education and Welfare,

Defendant.

NOTICE OF MOTION
FOR SUMMARY
JUDGMENT

Civil Action
No. 73 C 633

- -X

PLEASE TAKE NOTICE that the defendant will move this Court, Honorable Anthony J. Travia presiding, at courtroom number 9, sixth floor, United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, at 10:00 A.M. on Friday, February 8, 1974, or as soon thereafter as counsel can be heard,

for an order to enter summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure in favor of the plaintiff, on the grounds that the plaintiff is entitled to judgment for the reasons set forth in the annexed memorandum.

Dated: Brooklyn, N. Y.
January 21, 1974

Yours, etc.,

Prof. Oscar G. Chase
c/o Brooklyn Law School
250 Joralemon Street
Brooklyn, N. Y. 11201
625-2200

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

DEVLIN ADAMS, by Rossini Adams,
his parent and natural guardian,

Plaintiff,

CASPAR WEINBERGER, Secretary of
Health, Education and Welfare,

Defendant.

Civil Action
No. 73 C 633

- X

PLAINTIFF'S
STATEMENT OF FACTS
NOT IN DISPUTE

The within Statement of Facts is submitted in support of plaintiff's motion for summary judgment in accordance with Rule of the Court. None of the following facts is in dispute in this litigation.

1. Plaintiff, Devlin Adams, is the out of wedlock natural child of Rossini Adams and Peter McGinn, Jr. (the wage earner), Plaintiff was born in New York City on March 8, 1970.

2. The wage earner met his death violently and unexpectedly on February 18, 1970. The wage earner was insured under the Social Security Act, 42 U.S.C. §402 et seq., at the time of his death.

3. The wage earner and Ms. Adams lived together from approximately June 1969 to January 1970, when Ms. Adams, at her own instance, left their joint abode to return to her mother's residence. All of the rent due on the apartment shared by Ms. Adams and the wage earner was paid by the latter.

4. During the course of the relationship between the wage earner and Ms. Adams the wage earner contributed to her support by providing (in addition to rent) such money as she indicated she needed. This amounted to approximately two hundred to three hundred dollars in toto.

5. In addition to the money provided to Ms. Adams for general needs, the wage earner gave Ms. Adams $100.00 (one hundred dollars) to be used as a down payment and registration fee for the hospital services expected in connection with plaintiff's birth.

6. The wage earner stated his intention to pay for all medical expenses incurred as a result of plaintiff's birth. He anticipated that this would be approximately $1,000. (one thousand dollars).

7. During Ms. Adams' pregnancy the wage earner expressed concern for her health and urged her to stop working, allowing him to support her fully.

8. At the time of their separation in January 1970 the wage earner told Ms. Adams that if she did not want the expected baby she should give it to him.

9. Defendant denied child insurance benefits to plaintiff on the grounds that the wage earner was not living with plaintiff or making regular and substantial contributions to his support at the time of his death.

Respectfully submitted,

Prof. Oscar G. Chase
Attorney for Plaintiff
c/o Brooklyn Law School
250 Joralemon Street
Brooklyn, N. Y. 11201
625-2200

Dated: January 16, 1974
Brooklyn, N. Y.

JDP:GHW:ec
F. #730497

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

DEVLIN ADAMS, by Rossini Adams,
his parent and natural guardian,

Plaintiff,

- against -

CASPAR WEINBERGER, Secretary of
Health, Eudcation and Welfare,

Defendant.

- X

NOTICE OF MOTION FOR JUDGMENT ON THE PLEADINGS

Civil Action
No. 73 C 633

PLEASE TAKE NOTICE that the defendant will move this Court, Honorable Anthony J. Travia presiding, at courtroom number 9, sixth floor, United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, at 10:00 A.M. on Friday, January 18, 1973, or as soon thereafter as counsel can be heard,

for an order to enter judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure in favor of the defendant, on the grounds that the defendant is entitled to judgment as a matter of law, the findings of the defendant as to the facts being supported by substantial evidence.

Dated: Brooklyn, New York
December 10, 1973

Yours, etc.,

EDWARD JOHN BOYD V
Acting United States Attorney
Eastern District of New York
Attorney for defendant
225 Cadman Plaza East
Brooklyn, New York 11201
(212)-596-5700

By: George H. Weller
George H. Weller
Assistant U. S. Attorney

To: Oscar G. Chase, Esq.
c/o Brooklyn Law School
250 Joralemon Street
Brooklyn, New York 11201

JDP:GHW:dew
File No.
730497

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- x

DEVLIN ADAMS, by Rossini Adams, his parent and natural guardian,

Plaintiff,

-against-

CASPAR WEINBERGER, Secretary of Health, Education and Welfare,

Defendant.
- x

STATEMENT OF MATERIAL FACTS FOR WHICH GENUINE ISSUE EXISTS. GENERAL RULE (EDNY) 9(g)

Civil Action No. 73 C 633

The defendant contends that "there exists a genuine issue" as to the following:

[Note: For reasons given at the end of this statement a motion for summary judgment is inappropriate in this type of Social Security case. This response is to comply with General Rule 9(g) as this Court has not yet ruled that a motion for summary judgment is inapplicable in this type of Social Security case. The following is only an attempt to comply as there cannot be a trial as the Court is limited to the record.]

FIRST: (Plaintiff "facts" "3")

A. The reason for Devlin Adams mother leaving his natural father. She left because his lifestyle aggravated her and caused her to be depressed all of the time.

B. The payment for the apartment over the natural father's business. Any implication that this apartment was maintained solely for Devlin Adams' mother and would not otherwise have been maintained is rejected.

SECOND: (Plaintiff "facts" "4")

That the cost of maintenance of the apartment was a special contribution to support. The cost of maintenance would have been incurred anyway, whether or not Devlin Adams' mother was in the apartment.

THIRD: (Plaintiff "facts" "7")

The Secretary's reason for denying benefits was the failure to qualify under the law; the Secretary finding that the natural father was not living with or contributing to the support of the applicant at the time the natural father (insured individual) died.

WHY A MOTION FOR SUMMARY JUDGMENT IS INAPPROPRIATE IN THIS TYPE OF SOCIAL SECURITY CASE.

The Court is limited by 42 U.S.C. §405(g) to acting only on "the pleadings and the transcript of the record". But the transcript of the record is required by 42 U.S.C. §405(g) to be filed as a part of the Secretary's answer. The plaintiff is really asking the Court to decide that the Secretary is entitled to judgment as a matter of law on the basis of the pleadings [e.g. 6 MOORE's FEDERAL PRACTICE 56.02[3] (p. 2035 2d ed. 1971)], not on the basis of the pleadings and matter outside of the pleadings.

All of the judges in the District of Puerto Rico have recently agreed that a motion for summary judgment is inapplicable. Ayalau v. Secretary of Health, Education and Welfare, 51 F.R.D. 505 (D. P.R. 1971); Concepcion v. Secretary of Health, Education and Welfare, 337 F. Supp. 899 (D. P.R. 1971); Torres v. Secretary of Health, Education and Welfare, 337 F. Supp. 1329 (D. P.R. 1971). Other Federal courts have also recently held that summary judgment is not technically correct or necessary. Pippin v. Richardson, 349 F. Supp. 1365 (M.D. Fla. 1972); Weir v. Richardson, 343 F. Supp. 353 (S.D. Iowa 1972); Baker v. Richardson, 327 F. Supp. 349 (M.D. Fla. 1971). See, also, McMullen v. Celebrezze, 355 F. 2d 811, 814 (9th Cir. 1964).

Motion 4th 355

Dated: Brooklyn, New York
February 1, 1974

EDWARD JOHN BOYD V
United States Attorney
Eastern District of New York
Attorney for Defendant
225 Cadman Plaza East
Brooklyn, New York 11201

By: George H. Weller
GEORGE H. WELLER
Assistant United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

DEVLIN ADAMS by Rossini Adams, His Parent and Natural Guardian,

Plaintiff,

-against-

CASPAR WEINBERGER, Secretary of Health, Education & Welfare,

Defendant.

- x

73-C-633

DECISION AND ORDER

November 25, 1974

TRAVIA, D. J.

The defendant, by motion, seeks judgment on the pleadings pursuant to Rule 12(c), Fed.R.Civ.P. and the plaintiff cross moves for summary judgment pursuant to Rule 56(a), Fed.R.Civ.P.

The salient facts are as follows. The claimant, Rossini Adams, met the deceased wage earner, Peter McGinn, Jr., in 1968 and began living with him in June, 1969. They continued living together, off and on, until January, 1970, when the claimant decided to leave their joint abode and return to her mother's residence. /1 Apparently, the claimant's deci-

/1 The claimant was not living with the wage earner at the time of his death on February 18, 1970.

sion to completely break off with the deceased wage earner was predicated upon the fact that she was depressed, didn't like his class of friends and was pregnant. During the time that the claimant and the deceased wage earner were living together and after their separation, the deceased wage earner made sporadic cash payments to the claimant in order to provide general support and to defray medical expenses incidental to her pregnancy. These payments amounted to approximately $200.00 to $300.00. In addition, the deceased wage earner gave the claimant $100.00 to be used as a down payment and registration fee for hospital services to be rendered in connection with the plaintiff's birth. Similarly, the deceased wage earner stated his intention to pay for all medical expenses incurred as a result of the plaintiff's birth. He also expressed concern for the claimant's health and urged her to stop working during the pregnancy. However, there was never any decision to enter into a marital relationship, although the claimant has testified that the deceased wage earner told her that he would take the child if she did not want her or him.

Pursuant to the provisions of the Social Security Act, if a deceased wage earner's child was dependent upon the wage earner at the time of the wage earner's death, the child is entitled to child's insurance benefits. Title 42 U.S.C.

FPI N:—9-3-69-70M-2563

§ 402(d)(1)(C)(ii). A legitimate child is automatically entitled to benefits as the wage earner's offspring and presumed dependent. Title 42 U.S.C. §§ 416(e)(1); 402(d)(3)(A). An illegitimate child is placed in a somewhat different situation. In order to receive benefits, an illegitimate child must first qualify under one of several alternative provisions. Firstly, an illegitimate child who could, under the intestacy law of the wage earner's domicile, inherit the wage earner's personalty is eligible for benefits if he or she can show that the wage earner was the parent and that at the time of death, the wage earner lived with or contributed to the support of the child. Title 42 U.S.C. §§ 416(h)(2)(A); 416(e)(1); 402(d)(3). Secondly, an illegitimate who is the child of a marriage invalid because of the existence of an impediment when the marriage ceremony was performed is entitled to receive benefits. Title 42 U.S.C. §§ 416(h)(2)(B); 416(e)(1); 402(d)(3). Thirdly, an illegitimate may qualify for benefits if it is shown that the wage earner prior to his death either (1) had acknowledged in writing that the child was his son or daughter, (2) had been decreed by a court to be the father of the child, or (3) had been ordered by a court to contribute to the support of the child because he was the father. Title 42 U.S.C. §§ 416(h)(3)(C)(i); 416(e)(1); 402(d)(3). Lastly,

an illegitimate child who is unable to provide a written acknowledgment, a paternity decree, or a support order may still qualify for benefits under Title 42 U.S.C. § 416(h)(3)(C) if it is shown by evidence satisfactory to the secretary that the wage earner was the father and that the wage earner was living with or contributing to the support of the illegitimate child at the time of his death. Title 42 U.S.C. §§ 416(h)(3)(C)(ii); 416(e)(1); 402(d)(3).

In the case at bar, there is neither written acknowledgment of paternity, nor a court decree, nor a judicial support order. In addition, the provisions of Title 42 U.S.C. § 416(h)(2)(B) are not applicable since the claimant and the deceased wage earner never went through a marriage ceremony. Consequently, if the plaintiff is to obtain child's insurance benefits, it will be pursuant to Title 42 U.S.C. § 416(h)(3)(C)(ii). More specifically, in order to receive benefits, the plaintiff must show that his father was living with him or contributing to his support at the time of his death. /2

The plaintiff maintains that the defendant applied erroneous legal requirements in finding that the deceased wage

/2 The question of paternity is no longer in issue.

earner was neither living with nor contributing to the support of his son.[3] It is axiomatic that the Secretary's findings of fact cannot be disturbed unless they are contrary to the substantial weight of the evidence. However, the reviewing court is not bound to accept the Secretary's conclusions of law. See, e.g., Reading v. Richardson, 339 F.Supp. 295, 300 (E.D.Mo. 1972).

The Social Security Act provides benefits for posthumous illegitimate children born into a household which the deceased wage earner was either living in or supporting at the time of his death. Wagner v. Finch, 413 F.2d 267 (5th Cir. 1969).

A number of courts have interpreted the living with requirement of Title 42 U.S.C. § 416(h)(3)(C)(ii). In Bridges v. Secretary of HEW, CCH Unemployment Insurance Reporter, ¶ 16.480 (E.D.N.Y. 1971), Judge Weinstein of this court held that a wage earner who had spent many months in North Carolina for health reasons prior to his death was nonetheless living with his out of wedlock offspring who resided in New York. In addition, in Crisp v. Richardson, CCH Unemployment Insurance

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[3] The alleged erroneous legal requirements concern the case law definitions of living with and contributing to the support of.

Reporter, ¶ 16,612 (W.D.N.C. 1972), the court determined that the wage earner was living with his illegitimate child even though he had been arrested and imprisonad two weeks after the conception of the illegitimate child. In essence, the general rule is that the wage earner was legally living with the claimant if the separation which occurred prior to his death was caused by forces beyond his control. In the instant case, the wage earner's separation from the pregnant claimant was not caused by forces beyond his control. As previously mentioned, the wage earner lived with the claimant until one month before his death. The claimant's decision to leave their joint abode was reached after a discussion with the wage earner and was predicated upon the fact that she was depressed, did not like his class of friends and was pregnant. Moreover, at the time of the wage earner's death, no decision had been reached as to whether the wage earner and the claimant would start living together again in the future. Therefore, it cannot be said that the wage earner's separation from the claimant was caused by forces beyond his control. Rather, the separation was apparently precipitated by the wage earner and the claimant's incompatibility. A separation based upon incompatibility cannot be analogized to a separation based upon illness or imprisonment for the latter two

circumstances truly are forces beyond the wage earner's control.

The courts have also construed the contributing to the support of requirement of Title 42 U.S.C. § 416(h)(3)(C)(ii). In each of the cases where the court found that the wage earner was contributing to the support of the illegitimate child, there had been some regular and continuous support by the wage earner which for some unavoidable reason was interrupted on the date of the wage earner's death. For example, in Crisp v. Richardson, supra, the wage earner had given the child's mother some money to pay the hospital bill and had given her approximately $30 per month until a year before his death when he stopped contributing anything. Here, the wage earner never contributed to the claimant's support on a regular basis. Stated differently, the wage earner's contributions consisted of sporadic cash payments, totalling $200.00 - $300.00, and a payment of $100.00 to be used as a down payment on the hospital fee. In sum, a somewhat more adequate level of support than has been shown here is required before a finding of support can be made on the basis of the judicial construction of the statute. /4

/4 It should also be noted that the mere fact that the Secretary may have made an erroneous legal finding that sub-

The plaintiff also attacks the constitutionality of Title 42 U.S.C. § 416(h)(3)(C)(ii). /5 On substance, the plaintiff argues that the statute in question, Title 42 U.S.C. § 416(h)(b)(C)(ii), violates the Due Process Clause of the Fifth Amendment inasmuch as the statute discriminates against certain illegitimate children by requiring of them more proof than of legitimate children or of certain other illegitimate children.

In Norton v. Weinberger, 364 F.Supp. 1117 (D.Md. 1973, a three judge court in the District of Maryland upheld the constitutionality of Title 42 U.S.C. § 416(h)(3)(C)(ii). A

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stantial support is required does not in and of itself warrant reversal. Title 42 U.S.C. § 405(g) permits the reviewing court to interpret the law and to modify, affirm or reverse the Secretary's decision based upon that interpretation. In the case on review, while from a legal standpoint substantially did not need to be shown, continuity and regularity did need to be shown and since they were not, the Secretary's finding of no support should be allowed to stand.

/5 Since the plaintiff does not seek to enjoin the operation of the statute on constitutional grounds, but rather only seeks review of the Secretary's decision and raises the constitutional issue in conjunction therewith, a single judge may determine the constitutional issue. See Fleming v. Nestor, 363 U.S. 603 (1960); Garment Workers v. Donnelly Garment Company, 304 U.S. 243 (1938).

FPI MI—1-66-70M 2503

direct appeal was taken to the Supreme Court and the Supreme Court vacated the judgment and remanded the case to the district court for further consideration in light of Jimenez v. Weinberger, 417 U.S. _____, 94 S.Ct. 2496 (1974). See Norton v. Weinberger, _____ U.S. _____, 94 S.Ct. 3191 (1974). Consequently, this court must now turn to Jimenez v. Weinberger, supra, in order to resolve the constitutional issue at bar.

On August 21, 1968, Ramon Jimenez, a disabled wage earner, filed an application for child's insurance benefits on behalf of his three illegitimate children. The claims of two of the children were denied on the grounds that they did not satisfy the requirements of Title 42 U.S.C. § 416(h)(3)(B)(ii) since they had not shown that their father was living with or contributing to their support at the onset of his disability. Indeed, these two children were completely precluded under the statute from offering any proof on domicile or dependency since they were born after the onset of the wage earner's disability.

The Secretary attempted to upheld the classification of the statute on the grounds that:

> ". . . it is 'likely' that these illegitimates, as a class, will not [(1)] possess the requisite economic dependency on the wage earner which would entitle them to recovery under the Act and because [(2)] eligibility for such benefits to those

illegitimates would open the door to spurious claims." Jimenez v. Weinberger, supra at 2500

The Supreme Court rejected the Secretary's first ground since under the Secretary's view:

> ". . . the Act's purpose would be to replace only that support enjoyed prior to the onset of disability, no child would be eligible to receive benefits unless the child had experienced actual support from the wage earner prior to the disability, and no child born after the onset of the wage earner's disability would be allowed to recover." /6

This view is not supported by the language of the statute for under the statute certain after-born illegitimate children may qualify for benefits without a showing of domicile or dependency at the onset of the disability. See, e.g., Title 42 U.S.C. § 416(h)(2)(B).

With respect to the Secretary's second ground, the Court recognized that the prevention of spurious claims is a legitimate governmental interest. However, since the Court reasoned that the potential for spurious claims was exactly

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/6 In all likelihood, the reason the Supreme Court remanded Norton v. Weinberger, 364 F.Supp. 1117 (D.Md. 1973), vacated and remanded, _____ U.S. _____, 94 S.Ct. 3191 (1974), for further consideration in light of Jimenez v. Weinberger, 417 U.S. _____, 94 S.Ct. 2496 (1974), was because Norton was decided upon a premise that was specifically rejected in Jimenez, i.e., that the Social Security Act was designed to replace a child's support which was lost upon the death of the wage earner.

FPI MI—9-3-68-70M-2563

the same for illegitimates statutorily presumed to be dependent as for those in the appellants' situation, the Court could not see how "the blanker and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims." Jimenez v. Weinberger, supra at 2501.

Significantly, in the instant case, the plaintiff is not subject to a blanket and conclusive exclusion. Rather, if the plaintiff can show that the wage earner was living with or contributing to the plaintiff's support at the time of his death, the plaintiff is entitled to benefits. The plaintiff's situation then is qualitatively different from the situation of the appellants in Jimenez v. Weinberger, supra, for the plaintiff is not conclusively denied benefits presumptively available to certain other illegitimates. In substance, the domicile and support provisions of Title 42 U.S.C. § 416(h)(3)(C)(ii) are reasonably related to the prevention of spurious claims inasmuch as these provisions seek to insure dependence which presumably exists in the case of legitimate children and illegitimate children whose paternity has been acknowledged, decreed by a court or whose parents have been ordered by a court to contribute to the children's support. As a result, the statute's classification is rationally related to the legiti-

mate governmental interest in avoiding spurious claims and is therefore constitutional.

Accordingly, it is

ORDERED that the defendant's motion for judgment on the pleadings is granted; and it is further

ORDERED that the plaintiff's motion for summary judgment is denied in all respects.

s/ Anthony J. Travia
U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

DEVLIN ADAMS,

Plaintiff

by Rossini Adams, his parent and natural guardian

73 Civ. 633

vs.

NOTICE of APPEAL

CASPER WEINBERGER,

Defendant
As Secretary of health, Education & Welfare

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NOTICE IS HEREBY GIVEN that DEVLIN ADAMS, the above named plaintiff, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the District Court for the Eastern District of New York by the HON. ANTHONY J. TRAVIA entered on the 25 th day of November, 1974, which order denied plaintiff's motion for summary judgment and granted defendant's motion for judgment on the pleadings.

Dated: Brooklyn, New York
December 18, 1974

Oscar G. Chase
Attorney for Plaintiff
% Brooklyn Law School
250 Joralemon Street
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TO:DAVID G. TRAGER
United States Attorney
Eastern District of New York